at 415; the privilege "is not an adjunct to the ascer-
ent of truth," but is aimed at serving the complex
ues on which it has historically rested. 382 U. S.,
. Given this purpose, clear reliance on the pre-
rules, and the frustration of state interests which
ctivity would have entailed, we refused relief to a
risoner seeking collateral relief although the prose-
s comment on his failure to take the stand at his
would have infringed the new rule that was an-
ed in *Griffin* and was being applied in contemporary

nson v. *New Jersey*, 384 U. S. 719 (1966), reaffirmed
ew of the Fifth Amendment by declining to apply
iranda[7] rules to cases pending on direct review as
s to those involving applications for collateral re-
Stating that the "prime purpose of these rulings
guarantee full effectuation of the privilege against
crimination, the mainstay of our adversary system
minal justice," 384 U. S., at 729, the Court also
ized that the new rules to some extent did guard
t the possibility of unreliable admissions given
custodial interrogation. *Id.*, at 730. The ques-
however, was one of "probabilities." The hazard
rustworthy results in past trials was not sufficiently
ent to require retroactive application in view of
xisting, well-defined remedies against the use of
involuntary confessions, the obvious fact that the
arnings had not been standard practice prior to
da, and the consequent disruption to the adminis-
of the criminal law.

II

ded by our decisions dealing with the retroactivity
v constitutional interpretations of the broad lan-

[7] *anda* v. *Arizona*, 384 U. S. 436 (1966).

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f Rights, we agree with the Court of *hetti* and *Grosso* should not have any on Mackey's conviction. Petitioner trict accordance with then-applicable ns. Mackey would have a significant *chetti* and *Grosso* must be given full But in overruling *Kahriger* and *Lewis*, e was to provide for a broader imple- fth Amendment privilege—a privilege de at its core a concern for improving he results reached at criminal trials. tion in *Marchetti* or *Grosso* that one ons which moved the Court to hold could not constitutionally compel citi- gamblers and file related tax returns unreliability of such statements once has not advanced any objective con- ng such unreliability. The wagering ced in evidence at his trial have none es, and hence none of the potential un- ed confessions produced by "overt and *Johnson, supra,* 384 U. S., at 730. suggest that his returns—made under ate in any respect.[8] Thus, a gambling ike physical evidence seized in viola- rpretation of the Fourth Amendment, vant and probative even though ob- ernment through means since defined constitutionally objectionable. As in and *Williams*, the result here should *chetti* trial in which the Government dence is not set aside through retro- of the new constitutional principle.

ED STATES

hat *Marchetti* and *Grosso*
bout the accuracy of the
e. Under these circum-
ted by *Elkanich* and *Wil-*
d *Johnson*, must control.
te that even though deci-
Amendment may create
curacy of the results of
e decisions are adequately
ation. Accordingly, the
peals is affirmed.

It is so ordered.

SUPREME COURT OF THE

Nos. 36, 81, AND 82.—OCTOB

Fred T. Mackey, Petitioner, 36 *v.* United States.	On
Clarence Williams, Petitioner, 81 *v.* United States.	On
Joseph Elkanich, Petitioner, 82 *v.* United States.	

[April 5, 1971

MR. JUSTICE HARLAN, concurri
and dissenting in No. 81.

These three cases have one
the extent to which new constitu
by this Court for the conduct of c
cable to other such cases which wer
ent but then prevailing constitut

One of these cases is before us
81, *Williams*, the other two be
review, No. 82, *Elkanich*, and No
instance the new rule is held n
consequence, the judgments belo
reaching the merits of the und
sented. Two of the cases, *Willi*
volve the Court's decision in *Ch*
U. S. 752 (1969), changing the
permissible searches and seizure

STATES

1970

Certiorari
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largely eventuated in little more than a reaffirmation of the post-*Linkletter* developments.

What emerges from today's decisions is that in the realm of constitutional adjudication in the criminal field the Court is free to act, in effect, like a legislature, making its new constitutional rules wholly or partially retroactive or only prospective as it deems wise. I completely disagree with this point of view. While I do not subscribe to the Blackstonian theory that the law should be taken to have always been what it is said to mean at a later time, I do believe that whether a new constitutional rule is to be given retroactive or simply prospective effect must be determined upon principles that comport with the judicial function, and not upon considerations that are appropriate enough for a legislative body.

I

At the outset, I think it is clear that choosing a binding, generally applicable interpretation of the Constitution presents a problem wholly different from that of choosing whether to apply the rule so evolved "retroactively" to other cases arising on *direct* review.

In adopting a particular constitutional principle, this Court very properly weighs the nature and purposes of various competing alternatives, including the extent to which a proposed rule will enhance the integrity of the criminal process and promote the efficient administration of justice, as well as the extent to which justifiable expectations have grown up surrounding one rule or another. Indeed, it is this very process of weighing such factors that should constitute the core of our task in giving concrete embodiment to those constitutional commands that govern the procedures by which the state and federal governments enforce their criminal laws.

But we possess this awesome power of judicial review, this duty to bind coordinate branches of the federal sys-

to avoid making new legal norms through
n of dicta. This serious interference with
ve process is justified only by necessity, as
task of applying the Constitution to cases
Simply fishing one case from the stream of
view, using it as a vehicle for pronouncing
utional standards, and then permitting a
milar cases subsequently to flow by unaffected
w rule constitutes an indefensible departure
nodel of judicial review.

not resolve all cases before us on direct review
our best understanding of governing consti-
nciples, it is difficult to see why we should so
any case at all. If there is no need for an
tarian judicial control over the content of our
n in nine cases precisely like that presented
imel's dispute with the State of California, it
see the necessity, wisdom or justification for
nat control in the *Chimel* case itself. In truth,
assertion of power to disregard current law in
g cases before us that have not already run
urse of appellate review, is quite simply an
hat our constitutional function is not one of
on but in effect of legislation. We apply and
interpret the Constitution, under this view
not because we are bound to, but only because
nally deem it appropriate, useful, or wise. That
oice may permissibly be made by a legislature
il of revision, but not by a court of law.

ion that cases before us on direct review need
udicated in accordance with those legal princi-
ning at the time we are possessed of jurisdic-
e case entails additional significant untoward
ces. By this doctrine all other courts in this
re, in effect, reduced largely to the role of autom-

finitum what I view
ces of this aspect of
doctrine. For me,
an inexplicable and
asic principle upon
l review is sufficient
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court of law, charged
resolve every legal
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y is, however, quite
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ic, which cases then
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criminal judgments.
ey, were brought here
king release through
s.[1] At the time their

ners are entitled to seek
. C. § 2241, while federal
inated a motion to vacate
ever, our cases make these
urpose of substituting a
beas action in the federal
urisdictional basis for the
U. S. 205 (1952). As I
for retroactivity purposes,
ng collateral relief, I shall
procedures as the writ of
ng such judgments as cases

ed States, supra. This is not to say, however, that
nction of habeas corpus is to provide a federal
for determining whether any individual is pres-
in custody in violation of the Constitution . . . of
ited States," 28 U. S. C. § 2254, in the sense that
is for his incarceration would, under the law exist-
the time a petition is filed or adjudicated, as dis-
hed from the law that was applicable at the time
viction became final, be held free of constitutional
Cf. Meador, Habeas Corpus and the "Retro-
" Illusion, 50 Va. L. Rev. 1115 (1964).

e it has been generally, although not universally,
d that habeas courts should apply current con-
nal law to habeas petitioners before them,[3] I do
ieve this is or should be the correct view. First,
proposition has ever been squarely considered and
ed by this Court, at least since the recent prolifer-
of criminal defendants' protected constitutional
and the concomitant expansion of the writ.[4]

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ssor Mishkin has pointed out that "prior to *Linkletter*,
eria applied in federal habeas corpus proceedings were
y the constitutional standards in effect at the time of those
ngs, regardless of when the conviction was actually entered."
The Supreme Court, 1964 Term—Foreword: The High
he Great Writ and the Due Process of Time and Law,
L. Rev. 56, 78 (1965). See also, *e. g.*, Note, Developments
aw—Federal Habeas Corpus, 83 Harv. L. Rev. 1040, 1151,
970); *Sanders* v. *United States*, 373 U. S. 1, 17 (1963);
Gladden, 341 F. 2d 972, 975 (CA9 1965).

counter-example, see *Milton* v. *Wainwright*, 306 F. Supp.
Fla. 1969), where a district judge adjudicating a habeas
declined to consider any of this Court's decisions relating
untary confessions that post-dated 1958, the time at which
ioner's murder conviction became final. See also n. 4 *infra*.
ably, *Reck* v. *Pate*, 367 U. S. 433 (1961), tacitly holds that
petitions must be judged in accordance with current law.
rt there directed the issuance of the writ on the grounds

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ry to achieve the ends sought by *Brown*
The primary justification given by the
ng the scope of habeas to all alleged
rs is that it provides a quasi-appellate
forcing trial and appellate courts in
and state system to toe the constitu-
Kaufman v. *United States*, 394 U. S.
However, the opinion in *Kaufman*
hat there is no need to apply new
es on habeas to serve the interests
decision. 394 U. S., at 229. Further,
e margin below,[5] Congress, in at least

ction, finalized in 1936, had been procured by
evidence of an illegally obtained confession,
es decided by this Court subsequent to 1936.
in denying relief, had clearly held that the
nfession was to be judged by standards prevail-
States ex rel. Reck v. *Ragen*, 172 F. Supp. 734,
9). However, this choice of law problem was
d to and the case arose before this Court
enlargement of new constitutional rules of

amended the habeas statutes to deal with this
Sanders v. *United States*, 373 U. S. 1 (1963),
iples as they apply to habeas corpus. One
statute provides:
is proceeding brought in behalf of a person
to the judgment of a State court, a prior
eme Court of the United States on an appeal
decision of such State court, shall be con-
s of fact or law . . . actually adjudicated by
herein, unless the applicant . . . shall plead
nd the existence of *a material and controlling*
ppear in the record of the proceeding in the

ainly to have disapproved
nstitutional interpretation
lving state convictions.
regard this issue as not
onsequently, I go on to
solved. For me, with a
mpeting policies properly
that, given the current
ues cognizable on habeas,
abeas petitions, generally

been put in by exercising due
emphasis added).
uding a change in the law, it
ded in these circumstances for
hat "fact" is properly read nar-
t of subsections (a) and (b)
petition (where there was no
a "new ground" or "a factual
he [prior] hearing." Although
rse, it fully supports this read-
nmittee reports accompanying
rpose of the reformulation of
sure of finality into the law by
the *res judicata* concept. See
g., 2d Sess. 1966); S. Rep. No.
. There was no relevant floor

ce can properly be drawn that
those prisoners whose convic-
tionally determined that other
selves of all new constitutional
bsections (a) and (b) certainly
The congressional committee
that these amendments were
easible or desirable finality in
it is difficult to imagine what
stinction merely between those
e in the remote past, had full

to apply the law prevailing at th
became final rather than to seek t
cases on the basis of intervening cha
interpretation.

I do not mean to neglect the fo
contentions. Assuring every state
a forum in which he can continu
rent constitutional validity of the
tion does tend to assure a uni
treatment among prisoners; pro
correcting abuses now, but not fo
severely detrimental to societal in
promote a rough form of justice,
sense that current constitutional r
more "correct" or "just" than thos

In my view, however, these in
overstated. Some discrimination
the legal treatment of criminal co
where the governing law is co
change. And it has been the law,
as long as anyone currently in j
ated, that procedures utilized to co
been fundamentally fair, that is, i
command of the Fourteenth Am
state shall . . . deprive any pers
property, without due process of l
Jersey, 211 U. S. 78 (1908). Mo
suggest that constitutional updati
to assure that the system arrives o
By hypothesis, a final conviction
been adjudicated by a court cogniz
stitution and duty-bound to appl
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somehow forever erroneous becaus
took a different view of the relev
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is worth having and enforcing, it must at some time provide a definitive answer to the questions litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process. While men languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when finalized. See *Friendly, supra,* at 148–149. This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very fact of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first. See Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 384 (1964).

In sum, while the case for continually inquiring into the current constitutional validity of criminal convictions

ilable for attacking convictions on such grounds.[8]
elieve, is because it represents the clearest in-
here finality interests should yield. There is
ietal interest in permitting the criminal process
at a point where it ought properly never to
Moreover, issuance of the writ on substantive
ess grounds entails none of the adverse collateral
nces of retrial I have described above. Thus, the
interest in freeing individuals from punishment
uct that is constitutionally protected seems to
ciently substantial to justify applying current
of substantive due process to petitions for habeas
See generally Part II of my opinion for the
United States v. *United States Coin and Cur-*
— U. S. — (1971).

dly, I think the writ ought always to lie for
f nonobservance of those procedures that, as so
scribed by Mr. Justice Cardozo in *Palko* v. *Con-*
302 U. S. 319, 325 (1937), are "implicit in the
of ordered liberty." Typically, it should be the
t any conviction free from federal constitutional
the time it became final, will be found, upon re-
to have been fundamentally fair and conducted
hose procedures essential to the substance of a
ring. However, in some situations it might be
ne and growth in social capacity, as well as ju-
erceptions of what we can rightly demand of the
tory process, will properly alter our understand-
the bedrock procedural elements that must be
o vitiate the fairness of a particular conviction.

. *g.*, *Ex parte Siebold*, 100 U. S. 371 (1879); *Crowley* v.
en, 137 U. S. 86 (1890); *Yick Wo* v. *Hopkins*, 118 U. S.
6). And see cases collected in Amsterdam, Search, Seizure,
on 2255: A Comment, 112 U. Pa. L. Rev. 378, 384 n. 30
nd the discussion therein of the finality implications such
present.

at the interest in
interests protected
. *Texas*, 385 U. S.
senting opinion of
re correctly marks
not only in terms
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cular rule may be
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between those new
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263–269. I remain
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on, which is already
not been directly
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ral due process as to require upsetting this convic-
in spite of the fact that it was perfectly lawful when
ized. The agents here clearly had probable cause
rest petitioner, were not undertaking a fishing expe-
n for any evidence they might find but rather were
ng for specific items that they had reason to believe
t be concealed in various places around the premises
indeed, generally limited their search to areas indi-
l by petitioner. I would affirm the judgment below.

C

ackey v. *United States* (collateral review). Peti-
r in this case seeks relief from confinement by way
abeas. At his trial for evading payment of income
, part of the Government's case in chief consisted
ne introduction of 60 wagering excise tax returns.
he time his conviction became final in 1965, the
duction of these statements would have been per-
ible under the authority of *United States* v. *Kahriger*,
U. S. 22 (1953). I find it unnecessary to inquire
her it inevitably follows from the new rule enun-
d in *Marchetti* and *Grosso* that such a procedure
d today be held an unacceptable abridgement of
ioner's Fifth Amendment right to be free of com-
ory self-incrimination. For, even assuming the
r cases, if applicable, would produce a different re-
I cannot conclude that this change in the law
d be sufficient to entitle petitioner to the issuance
writ of habeas corpus.

ackey is not asserting that the conduct for which
s being punished, evading payment of his federal
ne taxes, has been held to be constitutionally im-
e from punishment. In this regard, Mackey's claim
rs from that raised by the respondent in *Coin and*

re at issue. Instead, Mackey's claim is
ures utilized in procuring his conviction
y the *Marchetti* and *Grosso* decisions.
f procedure rather than substance are
rt II of this opinion, I would apply to
f this habeas petition the law in effect
ckey's conviction became final, absent a
e procedures employed were fundamen-
hile *Kahriger* did indeed, in my judg-
n an "excessively narrow" view of the
ilege against self-incrimination, I cannot
ght reveals that judgment to have been
eous as to amount to the perpetration
le inequity against Mackey in these cir-
espite our rejection of it as a matter of
nt policy, the prior justification of the
tivity in this area—that persons affected
imination by ceasing to engage in illegal
t without some force.

question is, for me, not free of difficulty,
ne judgment below for the reasons stated

V

the Court in deciding these cases seems
orgotten the limitations that accompany
a court of law. For the retroactivity
ced today bespeaks more considerations
of legal principle. Treating direct and
as if they were of one piece seems
alysis, ignoring, as it does, the jurispru-
ations that differentiate the two kinds
functions. As a court of law we have
ect review to treat one case differently
ith respect to constitutional provisions

resettling the limits of the
which under the recent deci-
been given almost boundless
is prepared to do this I can
solution to the retroactivity
very much regret to see the
proach to that problem now
dence of this Court.
ments in Nos. 36 and 82 and
No. 81 upon the premises dis-

in its result, I am now of the view
n better decided had it simply held
s not lie for claimed errors in the

SUPREME COURT OF THE

No 36.—October T

Fred T. Mackey, Petitioner, } On
v. th
United States. } of C

[April 5, 19

Mr. Justice Brennan, with
shall joins, concurring in the

Three years ago we held that
statutes, 26 U. S. C. § 4401 *et*
whom they applied to such a re
of self-incrimination that thos
employed to punish criminally
defended a failure to comply
with a proper assertion of th
incrimination." *Marchetti* v. *U*
42 (1968); *Grosso* v. *United St*
This case presents the questio
Government is entitled to ma
returns, filed pursuant to the
prosecution for income tax
the Fifth Amendment does no
returns to show a likely sou
in a criminal prosecution fo
concur in the judgment of the

[1] This view of the case makes it
whether petitioner's conviction shou
to the standards embodied in *March*
this opinion is written on the assum
are applicable.

D STATES

Certiorari to
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JUSTICE MAR-

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S. 62 (1968).
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United States, 390 U. S. 62 (1968); *Heike* v. *United States*, 227 U. S. 131, 143–144 (1913); *Counselman* v. *Hitchcock*, 142 U. S. 547, 584–586 (1892). Since petitioner filed the wagering tax returns under threat of criminal prosecution for failure to do so, 26 U. S. C. § 7203, and since he never knowingly waived his Fifth Amendment privilege, see *Grosso* v. *United States*, *supra*, at 70–71, he is entitled to the immunity required by the Fifth Amendment. *Adams* v. *Maryland*, 347 U. S. 179, 181 (1954). Therefore, petitioner argues, the Government was foreclosed from using the information provided by him on the wagering tax returns against him in a criminal prosecution for evasion of the income tax.

But in *Marchetti* and *Grosso*, we dealt with the question whether, in light of possible uses of testimonial evidence sought to be compelled over a claim of privilege, the Fifth Amendment allows the individual concerned to withhold the evidence without penalty. In the present case, however, we deal with the scope of immunity required when the privilege is claimed and the evidence is nevertheless compelled. This distinction, in my view critical, is overlooked by petitioner. Where testimony has been refused, adjudication of necessity must take place in something of a vacuum. Although an individual may not "draw a conjurer's circle around the whole matter" by refusing to provide any explanation why the information sought might be incriminating, *United States* v. *Sullivan*, 274 U. S. 259, 264 (1927), he need not provide the incriminating evidence in order to demonstrate that the privilege was validly invoked. *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951). In such circumstance, sanctions may be applied for refusal to testify only if it is " '*perfectly clear*, from a careful consideration of all the circumstances in the case, . . that the answer[s] *cannot possibly* have [a] tendency

tivities ancillary to wagering.[3] *Id.*, at 44. On is we concluded that "throughout the United vagering is 'an area permeated with criminal stat- nd those engaged in wagering are a group 'in- suspect of criminal activities.' *Albertson* v. 382 U. S. 70, 79." *Marchetti*, 390 U. S., at 47. ngly, registration and payment of the occupa- ax, or the filing of a wagering excise tax return e Government required as a prerequisite to pay- f the excise tax,[4] would subject the individual ed to " 'real and appreciable,' and not merely ary and insubstantial,' hazards of self-incrimina- *Id.*, at 48; *Grosso*, 390 U. S., at 64–67. Since we the "required records" doctrine of *Shapiro* v. *States*, 335 U. S. 1 (1948), inapplicable to the y requirement that a gambler admit his present re involvement in gambling activity, *Marchetti*, S., at 55–57; *Grosso*, 390 U. S., at 67–69, we held e privilege against self-incrimination was available petitioners as a defense to prosecution for failure ter for, report, or pay the federal wagering taxes.[5]

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8 U. S. C. §§ 1084 (interstate transmission of wagering infor- 1301–1304 (conduct of lotteries by mails or broadcasting), terstate travel in aid of, *inter alia*, gambling), 1953 (inter- nsportation of wagering paraphernalia).

were informed by the United States in *Grosso* that the excise tax would not be accepted unless accompanied by ired return. 390 U. S., at 65.

ddition, we declined in both *Marchetti* and *Grosso* the Gov- 's invitation to salvage the statutory scheme by imposing rictions on the information required. *Marchetti*, 390 U. S.,); *Grosso*, 390 U. S., at 69. The relevance of this to the fore us is discussed *infra*, at ———. For the moment ficient to note that even the imposition of use restrictions ot have saved the convictions at issue in those cases, for tioners obviously had no way of knowing, when they failed ter and file the required forms, that use restrictions might osed. See *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52,

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S. 70 (1965). But
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But as we noted in *Mar-*
ndistinguishable from a

ingly, the considerations that led us to decline the imposition of use restrictions for the future in *Marchetti* and *Grosso* are not compelling in situations where the incriminating information has already been disclosed. Petitioner is therefore entitled to the immunity required by the Fifth Amendment, and to no more. Since I believe the Amendment is no bar to the use to which his wagering tax returns were put, I concur in the judgment of the Court.

OURT OF THE UNITED STATES

36.—October Term, 1970

Petitioner,
ates.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 5, 1971]

Douglas, with whom Mr. Justice Black ng.

d that all criminal and civil decisions tutional defenses which go in favor of ere necessarily retroactive. That is to ution has from Chief Justice Jay's time ,* for there were no decisions on the reto. *Marchetti* v. *United States*, 390 *Grosso* v. *United States*, 390 U. S. 62, ndants who when they did these acts ason of *United States* v. *Kahriger*, 345 d to a constitutional immunity. Why *Grosso* are entitled to relief and *Mackey* ery. It is said that Mackey's gambling ysical evidence seized in violation of a ion of the Fifth Amendment, is con- and probative even though obtained by through means since defined by this itutionally objectionable." The same *Marchetti* and *Grosso*. Yet they won

stand today's decision if *Marchetti* and unced only a prospective rule applicable

utional rule forged by the Court,
e, if justice rather than the for-
the time of the trial is the stand-
f the old unconstitutional rule
qually.

the Constitution that authorizes
s to be prospective and others be
ity often says the test is whether
egrity of the fact-finding process,
, 394 U. S. 244. Yet even that
en the majority thinks that the
if applied with due regard to the
would be "devastating." *Tehan*
19. The Constitution grants this
e powers.

expressed in *Linkletter* v. *Walker*,
Johnson v. *New Jersey*, 384 U. S.
to them. I would continue to
nal safeguards "strictly."

D OF

CASE